

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION

**BAODING TIANWEI GROUP CO.,  
LTD.**, a foreign entity,

Plaintiff,

v.

**PACIFICORP**, an Oregon  
corporation,

Defendant.

No. CV 07-862-HU

**OPINION AND  
ORDER**

---

**PACIFICORP**, an Oregon  
corporation,

Third Party Plaintiff,

v.

**WINBO INTERNATIONAL  
CORPORATION**, a California  
corporation, and **SUPER  
POWER EQUIPMENT CO.**, a  
California corporation,

Third Party Defendant.

---

**SUPER POWER EQUIPMENT CO.,  
WINBO INTERNATIONAL  
CORPORATION**,

Counterclaimants,

v.

**BAODING TIANWEI GROUP CO.,**

Counter Defendant.

Renee R. Stineman  
John R. Barhoum  
Dunn Carney Allen Higgins & Tongue  
851 S.W. Sixth Avenue, Suite 1500  
Portland, Oregon 97204  
Attorneys for Baoding Tianwei Group

R. Scott Douglas  
David Ismay  
Farella Braun + Martel  
235 Montgomery Street, 17<sup>th</sup> Floor  
San Francisco, California 94104

Angela M. Otto  
Stewart Sokol & Gray  
2300 S.W. First Avenue, Suite 200  
Portland, Oregon 97201  
Attorneys for Winbo International, Super Power Equipment

HUBEL, Magistrate Judge:

The matters before the court are plaintiff Baoding Tianwei Group's (Baoding) renewed motion to lift the stay (doc. # 134) and third party defendant Super Power Equipment's motions for leave to file surrebuttal (doc. # 148) and renewed motion to dismiss (doc. # 151).

Baoding brought this action on June 11, 2007, against Pacificorp, asserting claims for breach of contract based on Pacificorp's alleged failure to pay in full for two electrical transformers purchased from Baoding. On October 19, 2007, the court granted Pacificorp's motion to join Winbo International Corporation (Winbo) and Superpower Equipment Company (collectively, Super Power) as defendants (doc. # 28). On March 14, 2008, Super Power

1 filed counterclaims against Baoding for breach of contract,  
2 contribution, indemnity and declaratory relief. (Doc. # 43). On the  
3 same day, Super Power filed a motion to stay and compel arbitration  
4 with the China International Economic and Trade Arbitration  
5 Commission (CIETAC), pursuant to a written agreement designated as  
6 the Supplementary Agreement. (Doc. # 44). On March 28, 2008,  
7 Pacificorp filed a motion for summary judgment. (Doc. # 49). On  
8 April 10, 2008, while the motion to stay was pending, Baoding filed  
9 a reply to Superpower's answer and counterclaims, but did not  
10 assert any claims, although it reserved a right to do so. (Doc. #  
11 64).

12 In an Opinion and Order entered on September 10, 2008, the  
13 court granted Pacificorp's motion for summary judgment, holding  
14 that Pacificorp had met its obligations to Baoding. (Doc. # 94). In  
15 the same Opinion and Order, the court granted Super Power's motion  
16 to stay the action and compel arbitration, based on the agreement  
17 between Baoding and Super Power to arbitrate the disputes between  
18 them by referring such disputes to the Chinese International  
19 Economic and Trade Arbitration Commission (CIETAC). Id.

20 On December 4, 2008, the court entered an order staying Super  
21 Power's counterclaims against Baoding, the only claims left in this  
22 case, pending arbitration (doc. #98). On January 21, 2010, the  
23 court entered an order denying Baoding's motion to lift the stay  
24 and denying Super Power's motion to dismiss its counterclaims  
25 against Baoding without prejudice. (Doc. # 124). The parties were  
26 ordered to initiate arbitration within 30 days. Baoding filed an  
27

1 application with CIETAC to initiate arbitration. Barhoum  
2 Declaration, Exhibit 5. The application was denied. Id. at Exhibit  
3 6.

4 On April 2, 2010, Baoding filed a renewed motion to lift the  
5 stay (doc. # 135). On May 26, 2010, Super Power notified the court  
6 that it had filed an arbitration request, which CIETAC had  
7 accepted. Notice of Acceptance of Third Party Defendant's  
8 Arbitration Demand, Exhibits A, B. Super Power filed a supplemental  
9 brief in opposition to Baoding's renewed motion to lift the stay  
10 (doc. # 144), asserting that because the parties can now assert  
11 their claims in arbitration, Baoding's renewed motion to lift the  
12 stay should be denied as moot.

13 Baoding countered with a reply brief asserting, for the first  
14 time in this litigation, that Baoding is not a party to the  
15 Supplemental Agreement containing the agreement to arbitrate. Super  
16 Power filed a motion requesting leave to file a surrebuttal  
17 memorandum (doc. # 148), and the court grants that motion.

18 Baoding contends that a different corporate entity, Baoding  
19 Tianwei Baobian Electric Co., Ltd., (Baobian) entered into the  
20 Supplementary Agreement containing the arbitration provision, so  
21 that any claims it might assert against Super Power in this case  
22 (as yet unidentified by Baoding) are unrelated to the pending  
23 arbitration. This argument is unavailing.

24 As Super Power points out, Baoding has represented to the  
25 court on numerous occasions that it is a party to the arbitration  
26 provision of the Supplementary Agreement. See, e.g., Baoding's  
27

1 Memorandum at p. 1-2 (doc. # 17) (Baoding a party to "a certain  
2 agreement that contains an arbitration provision"); Baoding Reply  
3 Memorandum at p. 1 (doc. # 24) (admission that Baoding "was a party  
4 to an arbitration provision with, and did not intend to bring  
5 claims against [Super Power]); Baoding's Opposition Memorandum, p.  
6 3 doc. # 55 ("Super Power relies on an arbitration provision in a  
7 contract entered into between Baoding and Winbo International on  
8 March 29, 2002.")

9 Further, in its Opinion and Order filed on September 10, 2008  
10 (doc. # 94), the court found that

11 on March 29, 2002, Baoding and Winbo International  
12 entered into an agreement supplementing the cooperation  
13 agreement and the agency agreement (the supplementary  
14 agreement), under which it was agreed that if Baoding  
15 sold its products directly or indirectly in Winbo  
16 International's region without Winbo International's  
17 consent, Baoding would be deemed in breach of the  
contract and would pay a fine of 25% of the total amount  
of the contract. Johnson Declaration, Exhibit 5; L. Ni  
Declaration ¶ 3. The supplementary agreement states that  
it "shall be a part of the original Agreements and shall  
be of equal legal effect as the original Agreements." The  
supplementary agreement also provides:

18 In the event of changes in the Companies of  
19 both Parties (such as changes to the name or  
20 nature of the Company), the foregoing  
21 Agreements and this Supplementary Agreement  
shall automatically be binding upon the new  
Company without separate execution.

22 Johnson Declaration, Exhibit 5 ¶¶ 4, 5.

23 The supplementary agreement provides that disputes  
24 unresolved through consultations are to be referred to  
CIETAC, and that the agreement is governed by Chinese  
law. Id. at ¶ 2.

25 Opinion and Order (doc. # 94) p. 3-4. The court's conclusion that  
26 Baoding, the plaintiff in this case, was a party to the arbitration  
27

1 provision of the Supplementary Agreement, regardless of changes in  
2 company name or nature, is the law of the case. Under that  
3 doctrine, the court is generally precluded from reconsidering an  
4 issue that has already been decided by the same court, or a higher  
5 court in the identical case. Thomas v. Bible, 983 F.2d 152, 154 (9<sup>th</sup>  
6 Cir. 1993).

7 The court has discretion to depart from the law of the case  
8 under certain circumstances, such as when the first decision was  
9 clearly erroneous, there has been an intervening change in the law,  
10 or other changed circumstances exist, see Mendenhall v. Nat'l  
11 Transp. Safety Bd., 213 F.3d 464, 469 (9<sup>th</sup> Cir. 2000); none of these  
12 considerations justifies a departure from the law of the case here.

13 Super Power has filed a renewed motion to dismiss without  
14 prejudice the counterclaims it asserted against Baoding, on the  
15 ground that CIETAC's acceptance of the application for arbitration  
16 provides access to the agreed-upon forum for resolving those  
17 disputes (doc. # 151). Pursuant to Rule 41(c) of the Federal Rules  
18 of Civil Procedure, a counterclaimant can voluntarily dismiss its  
19 counterclaims at any time before a responsive pleading has been  
20 served.

21 Baoding asserts that if the court permits Super Power to  
22 dismiss its counterclaims, the court should "similarly allow the  
23 simultaneous filing of Baoding's counterclaims and/or allow Baoding  
24 to file its counterclaims before dismissing Super Power's claims."  
25 Plaintiff's Response, p. 2. This argument is unpersuasive. Having  
26 determined that the claims between Baoding and Super Power are

1 subject to arbitration with CIETAC, the court declines to permit  
2 Baoding to assert new claims in order to maintain an action in this  
3 court and avoid arbitration.

4 **Conclusion**

5 Baoding's renewed motion to lift the stay (doc. # 134) is  
6 DENIED. Super Power's Motion for leave to file surrebuttal (doc. #  
7 148) is GRANTED. Super Power's motion to dismiss its counterclaims  
8 without prejudice (doc. # 151) is GRANTED.

9 IT IS SO ORDERED.

10  
11 Dated this 30th day of September, 2010.

12 /s/ Dennis J. Hubel

13 \_\_\_\_\_  
14 Dennis James Hubel  
15 United States Magistrate Judge  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27